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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 871

LANDON V. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
BARBARA A. BABCOCK

January 3, 1966

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Statutes Involved	3
Questions Presented	2-3
Statement	3-6
Reasons for Granting the Writ	6-13
Conclusion	13
Appendix	1a-21a

CITATIONS

Cases:

Beck v. Washington, 369 U.S. 541, 556 (1962)	8
Sheppard v. Maxwell, No. 490, October 1965 Term, *cert. granted*	10
United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952)	9
United States v. Marshall, 360 U.S. 310 (1959)	3, 12, 13

Statutes:

18 U.S.C. § 2314	3
28 U.S.C. § 1865(a)	2, 8, 9, 10

Miscellaneous:

Rule 21(a), F.R.Cr.P.	8

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No.

LANDON V. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming his conviction for interstate transportation of stolen grain and money in violation of 18 U.S.C. § 2314.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1965. On November 19, 1965, Justice White, Circuit Justice for the Eighth Circuit, extended the time for filing a petition for certiorari until January 3, 1966, and the Eighth Circuit in an order dated December 9, 1965, accordingly stayed its mandate. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When the alleged crime involved the insolvency of a major grain company in the heart of an agricultural community, and when that community was saturated with word-of-mouth, radio, television and newspaper publicity accusing petitioner of stealing from the farmers, whether it was proper, under the Federal standard of the fairest possible jury enunciated in 28 U.S.C. § 1865(a), to deny petitioner's protective motions for transfer, restriction of the jury panel and a continuance.

2. Whether, the fact that the jury was exposed, as a result of adverse publicity, to extensive information about petitioner's previous conviction calls for summary reversal under *Marshall* v. *United States,* 360 U.S. 310 (1959).

STATUTES INVOLVED

28 U.S.C. § 1865(a):

> *"Apportionment within district; additional jury commissioners*
>
> (a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial . . ."

F.R.Crim.P. 21(a):

> *"Transfer from the District or Division for Trial*
>
> (a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division."

STATEMENT

It is unnecessary to the contentions herein to relate the complex facts presented in a month of trial. In short, the charges involved the transfer of grain from a company of which petitioner was manager, Federal Grain Company (hereinafter referred to as FGC) to a company which he owned, Best Gin and Land Company, and transfers of certain checks from FGC to petitioner. Both the grain and the checks travelled in interstate commerce, allegedly in violation of 18 U.S.C. § 2314. (R. 1-8)[1]

FGC owned five huge elevators which had collected grain from hundreds of farmers in the Cape Girardeau, Missouri area. The company failed and it was said in newspapers, on television and radio, and wherever people met together that the farmers would never be paid for their crops, that the entire area would be economically injured, and that it was Butler's fault.

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[1] The citation "R. ...." refers to the pleading file constituting Vol. I of the original record on file herein. Vols. II through VIII, comprising the transcript of testimony, will be cited herein by the transcript page, *e.g.*, "Tr. ...."

(R. 57-63) On the eve of trial, a receiver was appointed for FGC and once again petitioner's name became a household word. (R. 79)

Defense counsel moved for a transfer of the trial from Cape Girardeau to St. Louis, another division of the same district, where, in fact, Butler had been indicted. (R. 19) The trial had been moved to Cape Girardeau on the government's *ex parte* motion. In the alternative to transfer, petitioner sought a continuance of the trial until the latest publicity had died down. (R. 70, 76) The defense also asked that the jury panel be restricted to people outside of the five counties which FGC had served. (R. 77)

Affidavits from seven citizens of the area supported the motions. (R. 51-63) A prominent farmer took oath, for instance, that through weekly auctions, and social and political activities, he had come into contact with a great many residents of southeast Missouri and had often heard them discuss FGC. He stated that people generally said Butler's dishonesty had cheated the farmers out of their crops, and that they hoped and expected that he would be sent to Federal prison. (R. 61-62) The memorandum in support of the motion for a change of venue pointed out that "word of mouth" publicity is as prejudicial and pervasive in a rural community as it would be inconsequential in an urban area. (R. 65) The affidavits also stated that there had been intensive radio, television and newspaper coverage of the FGC affair. The government did not submit counter-affidavits, or in any way controvert the defense's allegations of prejudicial publicity and talk.

But all protective motions were denied, and the voir dire commenced, with the prosecutor summarizing the

indictment very briefly because, as he told the veniremen:

> "I am sure that most of you folks live in that general area and I am sure that there were articles that appeared on the radio and television at the time. I am sure all of you have some knowledge of it." (Tr. 10)

Of the first sixteen veniremen called, thirteen were excused because they had preconceived opinions too strong to render an impartial verdict. (Tr. 7, 16, 18, 21, 26, 30, 32, 33, 34, 83, 84, 104, 111, 117, 127, 128, 144, 155, 163, 181, 184, 187) On the second day of the voir dire, in the presence of the entire panel, one veniremen stated that he could not give both sides a fair and impartial trial because:

> "I might mention we have did [*sic*] business with the people from Bell City and Vanduser and they have caused them a lot of trouble by this mishandling by the fact that the farmers didn't get their money." (Tr. 153)

A motion for mistrial was denied and the jury was "protectively" instructed, over defense objection that such "protection" served only to emphasize the prejudice. (Tr. 153-156)

Soon, another prospective juror revealed that she could not view the evidence with an open mind and was excused. (Tr. 181) This woman later remarked in the ladies room, in the presence of five jury panel members, that she was surprised to find Butler out of the penitentiary. (Tr. 191) When *in camera* inquiry revealed that all five had heard the remark, it was suggested, apparently by the court (so far as the record shows), that petitioner be examined and cross-examined

in camera to adduce a fair and uncolored statement of the facts of his prior conviction, and that defense counsel then explain those facts to the entire jury panel and ask each member whether he would be prejudiced. (Tr. 205-208) This procedure was followed over the objection of the prosecutor. (Tr. 220-229)

During the trial, however, when petitioner took the stand, the prosecutor sought to bring out further details of the conviction on cross-examination. Defense counsel's objection was overruled on the ground that during the voir dire the court had

> "permitted you to examine the jury and make a statement about the circumstances of what the charge was. Accordingly, I will now permit the government to go into it." (Tr. 1570)

The prosecutor then brought out that petitioner's state court conviction had been for obtaining money under false pretenses by issuing warehouse receipts for over 1000 boxcars of grain when there were only four boxcars in the warehouse. (Tr. 1572-73)

The jury deliberated seven hours, and returned a verdict of acquittal on counts IV and V, and conviction on counts I and III. The court pronounced a "general sentence" of ten years in the penitentiary and a fine of $10,000. On September 16, 1965, the Eighth Circuit upheld the conviction.

REASONS FOR GRANTING THE WRIT

1. The Cape Girardeau area of Missouri is classic midwestern farming country marked by expansive grain fields and occasional towns which serve as trading centers and news exchanges. Its economy depends on the farmer's well-being and is geared to his needs. In

the fall of 1962, the news spread throughout the area that a major grain company run by a financier from out of state had failed. Reaction was nearly unanimous; people felt and said repeatedly that "Landon V. Butler stole from the . . . farmers both money and products" . . . that he had "cheated hundreds of farmers out of their crops" and "ought to be convicted in the Federal Court." (Tr. 58, 59, 60) Stories on radio, television and in the newspapers mirrored and magnified the local sentiment.

The theme of the "lost crops" has run throughout the case as a striking example of community assumptions elevated to the status of facts and perhaps even determinative of verdict and sentence. Actually, no crops were lost, no farmers hurt, no economic disaster wrought. But the people of Cape Girardeau believed otherwise, and if anyone called to serve on petitioner's jury did not share the general belief, he was early initiated when one of the veniremen blurted out that there was "a lot of trouble by this mishandling by the fact that the farmers didn't get their money." (Tr. 153)

The Eighth Circuit held the remark nonprejudicial because the evidence showed that FGC was insolvent and the jury would have inferred that the farmers didn't get their money. (App. 8a) But there was no direct evidence that the farmers lost money and the inference was hardly compelled.[2] Equally consistent with FGC's insolvency was the inference that the farmers were paid on delivery of their grain, or would

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[2] The government's theory was not that the grain and checks which were transported in interstate commerce had been stolen from the farmers, but that they had been taken by fraud from FGC itself.

be paid when FGC's assets were liquidated. Only a Cape Girardeau jury would inevitably have assumed harm to the farmers. Generally, prejudicial inferences or even outbursts by prospective jurors would have been less likely had the trial been transferred to the urban area of St. Louis. Alternative ways to minimize prejudice were to postpone the trial or to restrict the venire to residents of the counties outside the area served by FGC.

But the trial court refused to rule on any of petitioner's protective motions until after voir dire and then denied them all. The Eighth Circuit sanctioned the post-voir dire decision and the ultimate denial of all the motions on the authority of *Beck* v. *Washington,* 369 U.S. 541, 556 (1962). Reading that case as requiring only that an accused should have "actually received a trial by an impartial jury", the court held that its own analysis of the voir dire and of the trial record and verdict showed that the jury had been fair. (App. 9a-10a)

Beck, however, was a state case setting minimal constitutional standards. Involved in petitioner's motions for transfer and for continuance until after the publicity had subsided was Rule 21(a), F.R.Cr.P. which contemplates pre-voir dire transfers and should be administered to achieve the fairest possible jury. This standard is explicit in the seldom cited, but crucial section of the Judicial Code which provides for the selection of grand and petit jurors from such parts of a district "so as to be *most favorable* to an impartial trial." (Emphasis supplied). 28 U.S.C. § 1865(a). Seemingly, 28 U.S.C. § 1865(a) would have dictated instant acquiescence in at least the motion to restrict the jury panel to residents of counties where people

had not dealt with FGC. In upholding the denial, the Eighth Circuit did not discuss the statute, though it was cited and argued by petitioner. The failure of the Eighth Circuit even to consider § 1865(a) reveals the necessity for this Court to set standards under which Federal cases should be transferred or tried by jurors drawn from areas other than that in which the alleged crime occurred.

Restriction of the venire was mandatory under § 1865(a) in the circumstances of this case. The statute indicates, moreover, that Federal courts of appeal should do more than check the actual performance of a jury for overt evidence of partiality. Rather, they should decide whether the jury was so selected at the outset as to be most favorable to an impartial trial. *United States* v. *Florio,* 13 F.R.D. 296 (S.D.N.Y. 1952) correctly applies the Federal standard in jury selection. There the court granted a change of venue because, although twelve impartial jurors might conceivably be found among the millions of persons in the Southern District of New York, the community prejudice was such that any jury would operate "under the shadow of doubt."

The "shadow of doubt" over any jury selected from Cape Girardeau deepened at voir dire. Twenty-three of the total sixty-one veniremen were excused for cause: questioning revealed that they had preconceived opinions too strong to render an impartial verdict. Only seven of those called had not heard of the case, and they all came from beyond the counties petitioner had sought to eliminate from the panel. (Tr. 52-53, 59-60, 114, 69-70, 128, 70, 70-71, 149-69, 151-52)

In some cases, it took persistent defense questioning to ferret out prejudice. Thus, two veniremen who

opened with flat denials of any opinion about petitioner's guilt or innocence, ended by equally flat admissions of prejudice. (Tr. 104, 117) Defense questions also uncovered the fact that two veniremen had done business with FGC and that an official of a finance company which dealt with local farmers thought "it might be a little embarrassing to the company if [he] had to sit on the jury . . ." (Tr. 189) The trial court did not excuse these jurors, perhaps because if such backgrounds were considered cause, no jury could have been selected. They were, instead, eliminated by defense challenges. The defense exhausted its challenges, however, and more than half of the jurors finally selected were farmers and small businessmen from the Cape Girardeau area. Only one had not heard of the case previously.

Factors militating against impartiality were apparent from the outset and became explicit at voir dire. The case was particularly exacerbating to the prejudices of an agricultural community. The jury was drawn from people in the area where the alleged crime occurred, many of whom were necessarily affected by the events of the case. Trial was preceded by sustained, specific adverse publicity and local talk. Easy alternatives to trial in these circumstances were also obvious from the outset, but were consistently ignored. Petitioner thus did not have the jury "most favorable to an impartial trial"; the Federal standard as enunciated in 28 U.S.C. § 1865(a) was not met.

2. At the heart of the "free press, fair trial" issue is the fact that intensive publicity often results in putting before the jury information which is inadmissible in evidence. See *e.g.*, petition in *Sheppard* v. *Maxwell*, No. 490, October 1965 Term, *cert. granted*. Here the

newspapers mentioned time and again that petitioner had served a sentence in the penitentiary. (See *e.g.*, Tr. 193). It was inevitable that some of the prospective jurors would read the accounts, likely that they would discuss them, as they did in the restroom incident, *supra,* pp. 5-6, and necessary that the trial court take some step to prevent the prejudice of random discussion.

The court's step was to adduce *in camera* the basic facts of the previous conviction, allowing cross-examination by the prosecution, and then to have defense counsel state the facts thus arrived at to the whole panel. Although this was a logical procedure and the defense agreed to it, it was, at best, an inadequate solution to a problem which arose only because the court insisted on trying the case at that specific place and time. The procedure created a risk of highlighting and impressing upon the jurors a fact which should have played no part in their deliberations. During the course of the trial, however, an illogical and even more prejudicial procedure, also an aftermath of the restroom incident, was followed. When petitioner took the stand, the prosecutor was allowed on cross-examination to bring out the worst aspects of the previous conviction—that it, like the crime with which petitioner stood charged, involved fraud and the juggling of grain and warehouse receipts on a large scale. (Tr. 1570)

Allowing the prosecutor's question was, in the first place, a violation of the court's own procedure for establishing before trial exactly what facts the jury would hear. At the *in camera* examination of Butler, the prosecutor had the opportunity to bring out particulars of the previous crime which he wanted pre-

sented to the veniremen. And when the presentation was made on voir dire, the prosecutor had a second chance to object or to offer further information as to anything he considered a misrepresentation, and did so. (Tr. 223) But the actual figures involved in the previous crime were never mentioned by the prosecutor until trial. The defense was thus lulled into the whole procedure with the natural understanding that only the facts arrived at and presented before trial would be before the jury.

Moreover, the extreme prejudice which occurs when the jury learns of similarity in the circumstances of previous crimes and current charges lies behind the rule severely limiting cross-examination on the subject. The court here departed from the rule because defense counsel had explained the conviction to the veniremen. But the explanation had been allowed in order to protect the defendant from the prejudice of the prospective juror's remark. A special shield devised for the defendant is of little use if, at the same time, the prosecution is supplied an extra and lethal weapon.

Under normal circumstances, if a previously convicted defendant testifies, the jury hears only the fact of the previous conviction. This jury heard so much additional information, to petitioner's great prejudice, only because of a procedure which resulted from the basic error of refusing to change either the place or the time of the trial or the constitution of the venire.

The circumstances of this case are similar to those in *United States* v. *Marshall,* 360 U.S. 310 (1959), in which the defendant was charged with unlawfully dispensing barbiturates. During the course of the trial,

the jury learned through news accounts that Marshall had before been convicted for practicing medicine without a license. Each juror stated in a special voir dire, however, that he would not be prejudiced by the news accounts and the trial court took no further action. In a *per curiam* opinion, this Court reversed because the jury was exposed to prejudicial information which was inadmissible in evidence.

Here, as in *Marshall,* adverse publicity resulted in exposing the jury to the normally inadmissible fact that petitioner's previous conviction involved a crime of similar scale to the one for which he was on trial. Here also, because the case was tried in Cape Girardeau, the jury was exposed through publicity, local talk and one venireman's remark in open court to the inadmissible and prejudicial community belief that the farmers would be hurt. Petitioner asks that the Court follow its course in *Marshall* and summarily reverse his conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
BARBARA A. BABCOCK

January 3, 1966

APPENDIX

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,736

LANDON V. BUTLER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Eastern District of Missouri.

[September 16, 1965.]

Before VAN OOSTERHOUT and MATTHES, *Circuit Judges,* and YOUNG, *District Judge.*

YOUNG, *District Judge.*

This is an appeal from a conviction on Counts I and III of an indictment consisting of five counts. The indictment was filed on June 15, 1962, against appellant and one Thomas E. Thompson, the latter being jointly charged with appellant in Counts I, II and IV. Counts I and II charged interstate transportation of stolen grain on or about October 3, 1960 until November 19, 1960 in violation of 18 U.S.C. § 2314. Counts III and IV charged interstate transportation of certain checks, "stolen, converted and taken by fraud . . ." on or about October 4, 1960, and on or about August 26, 1960 until October 6, 1960, respectively, in violation of the same statute. Count V charged a conspiracy to violate the statute, 18 U.S.C. § 371. The second count was dismissed on motion of the Government as to both appellant and Thompson. Thompson was acquitted on all the remaining counts in which

he was named. Appellant was convicted on Counts I and III, and acquitted on Counts IV and V. Appellant was given a "general sentence" of ten years and was fined $10,000.00.

The trial in the court below commenced on November 4 and ended on November 21, 1963. The prosecution called twenty-eight witnesses and introduced over 250 exhibits. The defense, in addition to the two defendants and three character witnesses for defendant Thompson, called ten witnesses and introduced some 80 exhibits. It is appellant's basic contention, on appeal, that there was error tainting the verdict. Appellant does not question the sufficiency of the evidence supporting the conviction under Count I, but does contend that the proof as to Count III, even if accepted as true, does not establish a violation of 18 U.S.C. § 2314.

At the trial, it was the Government's theory as to Count I that appellant, with unlawful intent to provide himself with funds for speculation in commodities futures, caused a large quantity of grain to be removed from the elevators of Federal Grain Co. (hereinafter referred to as Federal) to those of Best Gin and Land Co. (hereinafter referred to as Best) and thereafter to be shipped in interstate commerce, with drafts ultimately diverted to appellant for his own speculative purposes. It was the Government's theory as to Count III that appellant caused the bookkeeper of Federal to draw a check on that company's account to the order of another company controlled by appellant and that he thereafter caused the check to be transported in interstate commerce from Tennessee to Missouri, the proceeds of the check being expended for appellant's speculative purposes. Appellant was the operating manager of Federal and controlled Best, a corporation owned by his family.

Appellant contends that he was denied his constitutional right to a fair trial and an impartial jury in violation of

Rule 21(a) of the Federal Rules of Criminal Procedure[1] and the Fifth and Sixth Amendments to the United States Constitution due to the following errors alleged to have been committed by the trial court: (1) Denial of appellant's motions to transfer the case, (2) Denial of his motion for a continuance, (3) Denial of his motion for disqualification of jurors from certain counties, (4) Denial of his motion to quash the supplementary panel of eight veniremen from Cape Girardeau called during the first day of trial, (5) Denial of his motion for a mistrial on the ground of a prejudicial statement made by a prospective juror in the presence of the entire panel, (6) Denial of his motion for a mistrial on the ground that the court emphasized the prejudicial effect of the prospective juror's statement by instructing the panel to disregard the statement, and (7) Overruling the defense objection to questions by the prosecution in cross-examining appellant as to the details of a previous conviction.

Appellant further contends that prejudicial error resulted in the trial court's remarks in the presence of the jury to Brashears, a Government witness, during direct examination implying that Brashears' testimony was perjurious; and, also, that prejudicial error resulted from the prosecutor's misstatement of the evidence in his closing argument and the trial court's comment about the misstatement only compounded the resulting prejudice. Finally, appellant contends that the proof as to Count III, even if accepted by the jury, does not constitute a violation of 18 U.S.C. § 2314; and, the "general sentence" imposed upon appellant was improper.

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[1] Rule 21. Transfer from the District or Division for Trial. (a) For Prejudice in the District or Division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

Since there is no issue raised as to the sufficiency of the evidence it is not necessary to set forth the facts in detail except as they relate to appellant's assignments of error.

We shall discuss these contentions in the order mentioned.

I. THE ALLEGED UNFAIRNESS OF APPELLANT'S TRIAL.

The grain involved in Count I was allegedly stolen from the elevators of Federal at several towns in southeastern Missouri, and also a town in southwestern Illinois, just across the river. The grain in question had been gathered by Federal from farmers in the surrounding area. Federal eventually became insolvent and a number of farmers lost money as a consequence. In order to avoid the claimed prejudice of trial in Cape Girardeau, Missouri, in the farming area affected by the alleged thefts of grain, appellant and co-defendant Thompson moved before trial for a transfer of the case back to St. Louis, a different division of the same district. The indictment had been returned in the latter division, but the case had been transferred to Cape Girardeau on the Government's motion. The trial court denied appellant's motion to transfer on the ground that "at this stage of the proceeding" there was not sufficient showing that a fair trial could not be had in Cape Girardeau.

When appellant's case came on for trial he renewed his motion for transfer to St. Louis and also filed motions for a continuance and for disqualification of residents of the nearby counties as jurors. The trial court denied the motion for continuance and reserved ruling on the renewed transfer motion and the motion to restrict the panel pending the *voir dire* examination of jurors, after which time they were also denied.

The selection of the jury took two full days, most of the examination of the venire being concentrated on the

question of prejudicial opinions. A number of jurors were excused for cause, some of whom had preconceived opinions and others for various other reasons. After nine veniremen were excused the court declared a recess and eight additional talesmen were procured by the marshal. Appellant moved to quash this part of the panel when it was learned that these eight talesmen were residents of the City of Cape Girardeau and that the marshal had not left the city limits in selecting them.

On the second day of the jury's selection, a prospective juror stated on *voir dire,* in the presence of the entire panel, "I might mention we have did (sic) business with the people from Bell City and Vanduser and they have caused them a lot of trouble by this mishandling by the fact that the farmers didn't get their money." Appellant moved for a mistrial. The trial court denied the motion, immediately instructed the panel to disregard this remark and excused the prospective juror who had made it. Appellant again moved for a mistrial, claiming that the instruction was unwarranted and emphasized the assertion that the farmers had lost money by reason of appellant's activities. The motion was denied.

Another prospective juror was excused because she revealed, under examination by the prosecution, that she could not view the evidence with an open mind. After a recess, the trial court reported to the panel that during the recess, "while she was in the ladies' restroom she [the prospective juror just excused] made a remark concerning one of these defendants who is now on trial." The court then held a hearing in chambers to ascertain the facts as to the alleged remark. Five members of the panel were called in and informally questioned. They stated that they were in the restroom when the prospective lady juror just excused made a remark about her surprise that appellant was out of the penitentiary. These five ladies further stated that the remark did not prejudice them against appellant and that they could give

appellant a fair and impartial trial. The court then called appellant into chambers and over the objection by the Government permitted him to be examined as to the circumstances of his prior convictions. The court concluded that in view of the remarks made by one of the prospective jurors in the presence of others that either of the attorneys for defendants would be permitted to make a brief statement of the circumstances of the convictions to the entire panel and inquire whether or not this would prejudice any of the prospective jurors against appellant. Appellant's counsel, again over objection by the prosecution, made a brief statement to the prospective jurors about the prior convictions and examined them on *voir dire* to determine if this would prejudice them against appellant. All replied that they would not be prejudiced. No objection was made by appellant to this procedure, nor did he request that any member of the panel be excused on account of this incident.

Because appellant's counsel was permitted to explain the prior conviction to the jury on *voir dire,* the trial court later allowed the Government to question appellant about the same conviction in some detail on cross-examination when appellant testified for the defense. The Government first asked whether appellant had ever been convicted of a felony, and appellant answered in the affirmative. The next question asked was the nature of the felony, and appellant's counsel objected. The trial court ruled: "Mr. Joslyn, under normal circumstances the government could only go into the fact that he had been convicted of a felony. However, in this particular instance at your request and prior to the impaneling of the jury the court permitted Mr. Butler under oath to make a statement about the matter and nature of this charge. I then permitted you to examine the jury and make a statement about the circumstances of what that charge was. Accordingly, I will now permit the government to go into it." The Government then brought out that ap-

pellant's state court conviction had been for obtaining money under false pretenses by issuing warehouse receipts for over one thousand boxcars of grain when there were only four boxcars of grain in the warehouse.

At the conclusion of the *voir dire* examination, a jury of nine men and three women was selected to hear the case. Two male alternates also sat, but no occasion arose for them to take part in the deliberations.

Appellant's motions (1) to transfer, (2) for continuance, (3) to restrict the jury panel, (4) to quash the supplementary panel; and (5) and (6) the prospective juror's remark on *voir dire* and the court's instruction in that regard—these asserted errors collectively form the basis of defendant's claim that he was denied trial by an impartial jury.

(1) *The Denial of Appellant's Protective Motions.*

At the outset it may be observed that the resolution of questions as to prejudice are ordinarily within the discretion of the trial judge, "The trial judge has a large discretion in ruling on the issue of prejudice . . . Generalizations beyond that statement are not profitable, as each case must turn on its special facts." *Marshall* v. *United States,* 360 U.S. 310, 312.

Clearly the trial court did not err in postponement of its final rulings on these questions (except the motion for continuance) until after the *voir dire* examination, "The ultimate question is whether it is possible to select a fair and impartial jury and the proper occasion for such determination is upon *voir dire* examination." *Blumenfield* v. *United States,* 284 F.2d 46, 51 (8th Cir. 1960).

The motion for continuance made on the day of trial was based on the alleged prejudicial effect of the publicity resulting from the receivership of Federal. Here also the trial judge is vested with wide discretion in

ruling upon motions for continuance. *Callahan* v. *United States,* 223 F.2d 171, 177 (8th Cir. 1955). But since the basis of the motion was possible prejudice, the *voir dire* examination of the jurors furnishes the best evidence of whether any such prejudice existed.

This is also true of defendant's request that residents of five counties be excluded from the jury panel and his motion to quash the supplementary panel of eight veniremen from Cape Girardeau, which are ordinarily discretionary with the trial court.

The statement made by the prospective juror on *voir dire* in reference to the "trouble" caused "by this mishandling" was unsolicited and, of course, improper. Appellant argues that this was prejudicial and that the trial court's instruction to disregard the statement did not cure the impropriety, but on the contrary, only magnified the prejudice resulting from this remark.

As the Government points out in its brief, while the statement of the veniremen is somewhat ambiguous the "mishandling" referred to was either a mishandling of grain or funds or both.

It was the Government's theory, and a great deal of testimony was introduced to show that when the grain was shipped from Federal to Best a theft occurred. In fact, the grain, its proceeds, and the money referred to in the indictment were alleged to have been stolen from Federal. The testimony showed that Federal became insolvent and of course it followed that some or all of those who were doing business with Federal would suffer financial loss.

Since the essential contents of the veniremen's statement were later presented in testimony before the jury, the court's instruction to the jury concerning the statement could not have been prejudicial. The court properly told the jury to disregard the statement, as it was not evidence.

Most of these objections are based upon publicity that had been given Federal's difficulties and appellant's connection with Federal and Best. But as this court stated in *Blumenfield* v. *United States, supra* at p. 51, "It is clear that the mere presence of adverse publicity does not per se establish proof of prejudice, or necessarily establish that a defendant would be unable to obtain a fair trial within the district. 'The mere fact that a juror has read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excluding a juror.' *Finnegan* v. *United States*, 8th Cir., 204 F.2d 110."

During the thorough *voir dire* examination, which lasted two days, none of the jurors finally accepted indicated the slightest prejudice whatsoever, and appellant has in no way at any time raised any question about any of the twelve jurors finally impaneled at his trial. At *voir dire*, one of the jurors finally accepted stated that he had read some newspaper accounts regarding the case but did not recall what he read; another said that she had probably heard of the case; another that he had read only headlines and had no impressions about the case; another that she had read about it but had forgotten all the information except the name; another that she had read headlines but had formed no opinion; another that he had heard it discussed but formed no opinion and had not paid much attention to the case; another that he recalled seeing something about it in the newspaper but did not pay attention to it and formed no opinion; another that he read about the case but not enough to get an idea of what it was about or form an opinion; another that he only remembered a newspaper report but formed no opinion; and finally two others who had only heard of the case through newspapers and one who had never heard or read of the case and had no knowledge of it one way or the other.

The ultimate and decisive test is whether the jurors who tried appellant were fair and impartial. "Of course,

there could be no constitutional infirmity in these rulings if petitioner actually received a trial by an impartial jury." *Beck* v. *Washington*, 369 U.S. 541, 556.

It might be noted that the verdict of the jury indicated the opposite of bias or prejudice. It acquitted appellant on two of the four counts against him which were submitted to the jury.

The extensive *voir dire* examination of the jury panel and the answers of those selected and actually served certainly present "no clear and convincing proof of prejudice existing in the minds of any juror finally accepted and impaneled." *Beck* v. *United States*, 9th Cir. 1962, 298 F.2d 622, 629.

(2) *The Cross-Examination of Appellant.*

Appellant contends that the trial court erred in permitting the Government to cross-examine him as to his prior convictions. The inquiry into these convictions arose out of the "restroom incident." The trial judge, over the objection of the Government, permitted appellant's counsel to explain to the panel on *voir dire* the nature of the charges which had resulted in the prior convictions.

It does appear, as the Government has suggested, that appellant made the most of this opportunity by making an explanatory statement about his convictions to the jury with the further benefit of his counsel later examining the prospective jurors as to any possible prejudice which they might entertain in light of appellant's convictions. Later, when appellant testified during the trial, the trial court recognized the settled rule that a prosecutor, on cross-examination of an accused, may not go beyond the fact of a conviction into its details. However, the trial judge recognized, and we agree, that appellant opened up the scope of the inquiry himself and it was not prejudicial error for the Government to pursue the matter judiciously on cross-examination.

II. THE TRIAL COURT'S REMARKS TO BRASHEARS.

Appellant contends that the trial judge committed prejudicial error by his remarks to Brashears, the manager of Best, called by the Government as a witness. Brashears had known appellant and Thompson, the co-defendant, for over ten years. Thompson had given Brashers a job at Federal, and later, in April 1960, appellant had hired him as manager of Best. Before Brashears was called to testify, Barnes, the owner of Federal, had testified and disclaimed certain knowledge about relations between Federal and Best, grain shipments, and the speculations by appellant. Brashears, however, testified about a meeting in Atlanta on January 14, 1961, when the managers of all the Federal elevators met with Barnes for the purpose of discussing their future jobs and the financial trouble that Federal was experiencing in southeast Missouri. Brashears was present and on cross-examination by appellant's counsel testified that Barnes acknowledged having an interest in "a little elevator at McMullin," which was Best's location.

Earlier, the Government, referring to a check signed by Thompson for Best, asked Brashears on direct examination whether he remembered anything about the check being drawn, and Brashears said that he did not. Then came the following:

> "Q. Do you remember who was present when that check was drawn?
>
> . . . . . .
>
> A. Not right now I don't, Mr. Mayer, No.
>
> Q. You don't remember right now?
>
> A. Well, if you would bring out something that would make me remember, I mean—
>
> Q. I am just asking you do you remember who was present when that check was signed?

A. Well, Mr. Thompson was present. He has signed it.

Q. Were you present, sir?

A. I may have been.

Q. Was Mr. Butler present, sir?

A. He might have been, yes sir.

The Court: Just a minute. Mr. Brashears, let me tell you something. You are under oath in this court.

The Witness: Yes, sir.

The Court: You have previously testified about these things before the grand jury. Do you understand that?

The Witness: Yes, sir.

The Court: Now if you don't tell the truth in this court you are subject to perjury, do you understand that?

The Witness: Yes, sir.

The Court: All right. Now you think about these things."

Later during the day when the Government examined Brashears on redirect about the Atlanta meeting, defense counsel objected, saying "Your Honor, Mr. Brashears is the Government's own witness. They put him on the witness stand, telling here in court that his testimony is truthful and it is violation of all of the rules of evidence for this man to be cross-examining his own witness and we strongly object to it." The trial court said:

"Mr. Joslyn, Mr. Brashears was subpoenaed by the Government but after hearing his testimony today I am not so sure whether he is a witness for the Government or whether he is a witness for these defendants."

It appears that an important part of appellant's defense was his contention that Bernes knew of the close relationship between Federal and Best, and that he was

aware of the grain transfers. Appellant contends that figuring largely in the proof of Bernes' knowledge was the Atlanta meeting referred to by Brashears in his testimony, and, appellant argues, when the trial court warned Brashears that he was under oath and cautioned him, this "effectively destroyed Brashears' utility to the defense." On the other hand, the Government argues that Brashears' testimony was not crucial to the defense, as alleged, because he did not relate any of the details of the meeting and there was earlier testimony to the same effect by the witness Purdy, who also attended that meeting. The Government further argues that the trial court's remarks to Brashears were not prejudicial error, particularly in view of all the circumstances surrounding the incident and that appellant recognized this at the time is shown by his failure to ask corrective relief of the court.

The Atlanta meeting took place sometime after the grain transactions which were the subject matter of the indictment. This remark could not have suggested that Brashears was testifying falsely about the Atlanta meeting because the subject of the testimony at the time of the court's remarks was certain checks concededly immaterial to appellant's defense.

That appellant did not consider the remarks prejudicial at the time is evidenced by the fact that he made no objection. In his brief he concedes that "the testimony about the check . . . was of no great materiality." It is true that later appellant did object to the court's remarks to the effect that he was not sure whether Brashears was a witness for the Government or the defendants.

We do not mean to imply approval of these remarks by the trial court. In the exercise of appropriate judicial restraint they should not have been made.

However, at the conclusion of the trial, the judge included in his instructions to the jury:

> "It has been and will be the court's purpose to express no opinion upon the facts in this case for that is the province of the jury and if you have thought at any time during the trial that the court has indicated any opinion with respect to what the facts are you may disregard it . . . I have meant nothing by voice or manner to indicate any opinion upon what is or is not a fact in this case . . ."

As stated before, this case took nearly three weeks to try and the record discloses that it was hotly contested. As late Judge Sanborn said in *Goldstein* v. *United States*, 63 F.2d 609, 613 (8th Cir. 1933):

> "It is not always possible during the trial of a hotly contested case for a judge, however impartial he may be, to maintain in the courtroom that atmosphere of complete judicial calm which is so much to be desired. We must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits . . . It is impossible to gather from the cold record, particularly when it is in narrative form, the atmosphere of the trial itself, the manner in which the words were spoken, or the probable effect, if any, which they had upon the merits of the controversy. Critical remarks of the court frequently cut both ways, if they cut at all . . . An appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits."

Considering the fact that appellant did not object to the first remarks by the trial judge quoted above during

the testimony of Brashears, the court's later cautionary instruction to the jury, the fact that the later remarks by the court to which appellant did object are not manifestly prejudicial, we are convinced that the trial court did not commit error prejudicial to appellant by its remarks to the witness Brashears.

III. THE PROSECUTOR'S MISSTATEMENT.

Appellant argues that the prosecutor in his closing statement was permitted to misrepresent the crucial testimony of the witness Allgire. Appellant points out that on the issue of Bernes' awareness of the speculations being conducted for Federal in various names, the only testimony from a completely disinterested witness was that of Mr. Allgire; and, appellant further says that while the jury might have failed to perceive from other evidence that Bernes must have known of the speculations, the jury could hardly have rejected Allgire's testimony that, on November 30 or December 1, 1960, before the collapse of Federal he heard Bernes and appellant discuss "the losses which Federal Grain had incurred in the commodities future market through the accounts of Mrs. L. V. Butler and Best Gin & Land Company."

It appears that the Allgire testimony was first referred to in the closing argument of the defense when counsel accurately summarized the testimony, and the prosecutor interrupted, saying, "I am going to object to that, Your Honor. That was not the question that was asked, nor was that the answer given." The trial court then stated, "Well, the jury will remember what the testimony is. This is argument, this is not the evidence, this is merely the lawyer's statement about what happened. You will remember the evidence."

Later, during the closing statement for the Government, the prosecutor incorrectly summarized the testimony of Allgire to the effect that Allgire heard a con-

versation between Bernes and Butler about trading in futures but nothing was said in the conversation about trading in Mrs. Butler's name, or in other names or anything of that type. When counsel for appellant objected to this inaccurate summation, the trial court said: "Now, gentlemen, let's let everybody make their own argument. The jury is going to remember this conversation. I have refrained from doing anything and let you attorneys say whatever you want to say. Both of you for the defendants did the same thing. Let the jury remember. Go on with your argument." The prosecutor further commented on the Allgire testimony, questioning why the defense did not proceed to ask Allgire the details of the conversation. In its general charge to the jury after the closing arguments were concluded, the trial court instructed the jury that what counsel stated was not evidence, but rather the evidence was as they, the jury, remembered it to be.

Appellant contends that prejudicial error resulted from the prosecutor's misrepresentation and the error was compounded by the trial court's comment about the misrepresentation. Appellant argues that taking the most generous view of the matter, the prosecutor chose to leave an "ambiguity," and, by a less generous view, he chose to persist in his misrepresentation, no longer an honest one, relying on the trial court's apparent indisposition to interfere with him. The Government concedes that the prosecutor made a misstatement but contends that it was an honest misrepresentation, and, therefore, under the language of this court in *Nicholson* v. *United States,* 221 F.2d 281 (8th Cir. 1955), the error committed was not prejudicial.

In *Nicholson* v. *United States, supra* at 283, this court stated:

> ". . . Our examination of that part of the testimony which is contained in the record indicates that defendant is probably correct in his interpretation of

the import of the testimony. Each time the dispute arose between counsel the court informed the jury that the jury was the sole judge of what the testimony was. Misconduct of counsel in argument to the jury is ground for reversal under some circumstances. *But an honest misinterpretation of testimony, such as this apparently was, without some indication of resulting prejudice does not constitute reversible error.*" (Emphasis added)

See also *Keeble* v. *United States*, ... F.2d ... (8th Cir., July 9, 1965).

It should be pointed out that while appellant disputed the prosecutor's summation, no request for a mistrial was made and the trial court was not requested to instruct the jury to disregard the statement. There is nothing in the record which indicates that the misstatement was other than an honest misrepresentation and nothing more. Prefacing his summarization of the witness' testimony, the prosecutor said: "This is the way I understood . . ." —and when he concluded he said: "I think that was all that was said." We cannot say that the misstatement was so "palpably improper as to have been clearly prejudicial," *United States* v. *Cohen*, 177 F.2d 523, 527 (2d Cir. 1949), and there is absent any clear and convincing proof of prejudice resulting from the misstatement; hence, it was not prejudicial error, and the error committed was cured by the trial court's instruction to the jury. *United States* v. *Barrett*, 280 F.2d 889 (2d Cir. 1960).

IV. SUFFICIENCY OF THE EVIDENCE UNDER COUNT III.

Appellant next argues that there was insufficient evidence to support his conviction under Count III which alleged a violation of 18 U.S.C. § 2314. The violation alleged was that appellant caused to be transported from Memphis, Tennessee, to Oran, Missouri, a $6,000 check

which he knew was stolen, converted and taken by fraud from Federal. Appellant does not deny that the check in question was in fact transported from Tennessee to Missouri and he does not deny, for the purpose of this appeal, that there was adequate proof that he caused the transportation. However, appellant argues that there was no proof that the check in question had been stolen or converted, and hence it was error for the trial court to deny appellant's motion for judgment of acquittal made at the conclusion of the Government's case and of the whole case.

In summary, appellant rests its contention that the check was not stolen on two arguments: (1) He had such blanket authority in handling the affairs of Federal that the order to issue this check could not exceed the scope of this authority; and (2) Federal owed him $66,000 in commissions under his "consultant" contract, and hence he was entitled to this check. The Government contends, and we agree, that in light of all the evidence there was at least a factual issue created as to whether or not appellant was authorized to order the issuance of the check in question for the particular purpose shown by the evidence. If such a factual issue was created, and we think it was, then the trial court did not err in overruling the motion for a directed verdict of acquittal. Once such an issue was created, it was the duty of the jury to determine whether or not the check was stolen within the meaning of 18 U.S.C. § 2314.

In the case at bar, we have viewed the evidence in the light most favorable to the Government, *Koolish et al.* v. *United States,* 340 F.2d 514 (8th Cir. 1965). It would serve no useful purpose to discuss the evidence in this regard which both appellant and the Government have thoroughly argued in their respective briefs. Suffice it to say that we are compelled to conclude that there is substantial evidence in the record from which the jury could have found that the check in question had been stolen,

and, therefore, it was not error for the trial court to deny appellant's motions for judgment of acquittal under this count.

Finally, appellant contends that, even if his conviction should not be reversed, his sentence should be vacated and the case should be remanded for resentencing. The sentence imposed on appellant was a "general sentence" of ten years and a fine in the sum of $10,000 on Count I and Count III of the indictment. Appellant argues that he should have been sentenced on each count and relies on *Benson* v. *United States,* 332 F.2d 288 (5th Cir. 1964), in which the court disapproved the use of a "general sentence" and vacated it.

Both Counts I and III allege a violation of 18 U.S.C. § 2314. The maximum punishment under both is therefore identical—a fine up to $10,000 and a term of imprisonment up to ten years.

In *Benson, supra,* the defendant received an aggregate sentence of 15 years, which exceeded the maximum on any one particular count. The problem there, the court said, was "that no one, accused, [or the] reviewing court . . . knows what the real sentence is." But here that problem is not involved. The sentence did not exceed that which could have been imposed on either count.

This court has previously sustained general sentences. *Phillips* v. *United States,* 212 F.2d 327 (8th Cir. 1954); *Barnes* v. *United States,* 197 F.2d 271 (8th Cir. 1952). This contention is therefore without merit.

CONCLUSION

We have carefully considered the entire record with the assistance of the excellent briefs provided by both sides. Appellant has been represented by able counsel throughout the proceeding. We are convinced that his federal right to a fair trial and an impartial jury was

fully preserved in the trial court, and his conviction is based upon substantial competent evidence. Finding no prejudicial error in the record, the judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[Filed September 16, 1965]

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1965

No. 17,736

LANDON V. BUTLER, *Appellant,*

v.

UNITED STATES OF AMERICA.

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Landon V. Butler, do

surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the District Court.

September 16, 1965.

Order entered in accordance with Opinion:

ROBERT C. TUCKER

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Rule involved	2
Statement	2
Argument	13
Conclusion	19

CITATIONS

Cases:

Blumenfield v. *United States*, 284 F. 2d 46, certiorari denied, 365 U.S. 812	14
Connelly v. *United States*, 249 F. 2d 576, certiorari denied, 356 U.S. 921	13, 16
Estes v. *United States*, 335 F. 2d 609, certiorari denied, 379 U.S. 964	13, 14
Marshall v. *United States*, 360 U.S. 310	19
Myers v. *United States*, 15 F. 2d 977	16
Reynolds v. *United States*, 225 F. 2d 123, certiorari denied, 350 U.S. 914	13, 14
Stroud v. *United States*, 251 U.S. 15	13, 14
United States v. *Florio*, 13 F.R.D. 296	14
United States v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U.S. 909	13
Walsh & Wells v. *City of Memphis*, 32 F. Supp. 448	17

Statutes and rule:

18 U.S.C. 2314	2
28 U.S.C. 1865(a)	16
Rule 21(a) F. R. Crim. P.	2, 4, 13

206-047—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 871

LANDON V. BUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (9 R. 1–21; Pet. App. 1a–20a) is reported at 351 F. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1965 (9 R. 22; Pet. App. 20a–21a), and a petition for rehearing (9 R. 23–36) was denied on November 4, 1965 (9 R. 37). On November 19, 1965, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including January 3, 1966, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a change of venue.

2. Whether the jury was improperly exposed to prejudicial publicity.

RULE INVOLVED

Rule 21(a) of the Federal Rules of Criminal Procedure provides:

> RULE 21. TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL
>
> (a) *For Prejudice in the District or Division.* The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

STATEMENT

Following a trial by jury, petitioner was convicted in the United States District Court for the Eastern District of Missouri on counts 1 and 3 of a five-count indictment (1 R. 1–8) charging that he knowingly transported in interstate commerce $168,000 worth of stolen corn and soybeans (count 1) and a stolen check in the amount of $6,000 (count 3), in violation of 18 U.S.C. 2314. One Thompson, who was named as a

codefendant on count 1, was acquitted.[1] Petitioner was sentenced generally to ten years' imprisonment and to pay a fine of $10,000 (1 R. 116). The court of appeals affirmed (9 R. 22; Pet. App. 20a–21a).

Since petitioner does not challenge the sufficiency of the evidence to support his conviction, there is no occasion to summarize the proof in detail. As noted in the opinion below (Pet. App. 2a; see also Pet. App. 17a–18a), it was the government's theory as to count 1 that petitioner, with unlawful intent to provide himself with funds for speculation in commodities futures, caused a large quantity of grain to be removed from the elevators of the Federal Grain Company ("Federal") to those of Best Gin and Land Company ("Best") and thereafter to be shipped in interstate commerce, with drafts ultimately diverted to petitioner for his own speculative purposes. It was the government's theory as to count 3 that petitioner caused the bookkeeper of Federal to draw a check on that company's account to the order of another company, controlled by petitioner, and that he thereafter caused the check to be transported in interstate commerce from Tennessee to Missouri, the proceeds of the check being expended for petitioner's speculative pur-

[1] Count 2, which charged both petitioner and Thompson with the interstate transportation of another consignment of stolen grain, was dismissed at the trial as to both defendants on motion of the government (6 R. 1163). Petitioner was acquitted on count 4, which charged him alone with the interstate transportation of other stolen securities (1 R. 92). Both petitioner and Thompson were acquitted on count 5, which charged them with conspiracy to violate the statute involved in the substantive counts.

poses. Petitioner was the operating manager of Federal and controlled Best, a corporation owned by his family.

The facts germane to the contentions raised in the petition for a writ of certiorari may be summarized as follows:

1. On December 14, 1962—six months after the return of the indictment—petitioner and his codefendant filed a motion in the district court, pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure (*supra*, p. 2), for an order transferring the cause for trial from the Southeastern (Cape Girardeau) Division of the Eastern District of Missouri to the Eastern (St. Louis) Division of the same District, on the ground that there existed prejudice against them in the Southeastern Division so great that they could not obtain a fair and impartial trial there (1 R. 49).[2] Attached to the motion were affidavits by seven residents of the Southeastern Division (1 R. 51–63), of which the affidavit of J. R. Lee (1 R. 51–52), which we summarize, was illustrative and typical.

Lee attested that petitioner and Thompson were the operators of the Federal Grain Company, which to his knowledge had become bankrupt and was indebted

[2] The indictment, which was returned in the Eastern Division of the District, had previously been transferred to the Southeastern Division, on motion of the government, for the reason that the indictment charged "an offense committed within the Southeastern Division" (1 R. 9). The December 14 motion was thus, in effect, one to have the cause transferred back to the Eastern Division.

to many farmers in the area with respect to grain which they had purchased from them; that petitioner and Thompson had subsequently been indicted by a federal grand jury (the proceeding involved at bar), charged with an offense arising out of their conduct of the affairs of Federal; that there had been extensive publicity about the case in the local newspapers and on local radio and television stations, indicating or insinuating that there had been wrongdoing on the part of the accused; that the affiant had talked to many people in southeastern Missouri concerning the accused and Federal in the past two years and had heard it said almost unanimously by such persons that the accused had stolen and diverted funds of Federal, that they had cheated hundreds of farmers out of their crops, and that they would surely be convicted. Neither of the accused, the affidavit concluded, could, in the affiant's opinion, receive a fair trial in the Cape Girardeau Division of the court (1 R. 51–52).

The government, opposing the motion, pointed out that the venue of the charged offenses was the Southeastern Division of the District; that approximately 90 per cent of the government's witnesses (who were estimated to total 25) resided in the Southeastern Division; that while it was true that the matters in issue had received extensive publicity at the time of the commission of the alleged crimes, "in November, 1960,"[3] more than two years had since passed and

[3] The substantive offenses charged were alleged to have occurred on different dates between August and November of 1960 (1 R. 1–4). The conspiracy charged in count 5 was alleged to have extended from October 3, 1960, to January 31, 1961 (1 R. 4).

much of the publicity had been forgotten; that the matters in controversy had also received wide publicity in the St. Louis area, to which the defendants were requesting that the prosecution be transferred; and that the question whether a fair trial could be had in the Southeastern Division should appropriately await the *voir dire* examination of the prospective jurors (1 R. 66–68). On March 29, 1963, the motion for transfer was denied (1 R. 70–71).

2. On November 4, 1963, the date set for trial following an intervening continuance granted at the request of the government over the opposition of both defendants (1 R. 74–75),[4] the defendants moved (1) for a continuance, on the ground that, because of the pending receivership of Federal and the publicity attending the same, there still existed such great prejudice against them that a fair trial could not then be had (1 R. 79), and (2) for an order striking from the jury panel the names of all prospective jurors who resided in any of five designated counties of the Southeastern Division, on the ground that, because of the publicity concerning the affairs of Federal in those counties, impartial jurors could not be found in those counties (1 R. 77). The defendants also renewed at this time their motion to have the case

[4] The court's March 29 order had set the case for trial on June 24, 1963 (1 R. 70–71). The government, on June 17, moved for a continuance on the ground that an important government witness was about to give birth to a child (1 R. 74). Counsel for the defendants advised the court, in opposing this motion, that the defendants were "ready for trial on June 24, 1963" and were opposed to "any continuance of the case" (1 R. 75).

transferred for trial to the Eastern Division of the District (1 R. 76). The motion for continuance was denied on the same day, prior to the commencement of the *voir dire* examination of the prospective jurors (2 R. 3). Rulings on the other two motions were reserved until after completion of the *voir dire* examination (*ibid.*), at which time they too were denied (2 R. 236).

3. The *voir dire* examination of the prospective jurors extended over two days, November 4 and 5, 1963 (2 R. 5 *ff.*). Wide latitude was allowed defense counsel in exploring, through personally conducted oral inquiry, for possible bias and prejudice on the part of any member of the panel (*e.g.*, 2 R. 79–135). Upon the slightest indication by any panel member that he had or might have a preconceived opinion about the merits of the case, he was excused for cause (see, *e.g.*, 2 R. 127–128). Of the approximately 60 veniremen examined (including a number of talesmen used to supplement the original panel), 22 were excused for cause because they had formed an opinion or had received an impression about the case.[5] Four others were excused for cause for reasons unrelated to bias or prejudice.[6] While many of the remaining 34, not excused for cause, from whose number the jury was selected, had heard something about the case as a consequence of the publicity it had received in the past, all stated that they were wholly free of precon-

[5] 2 R. 16, 20–21, 26, 30, 31–34, 82–84, 102–104, 110–111, 116–117, 126–128, 143–144, 155, 163, 181, 183–184, 186–187.

[6] 2 R. 7, 18, 41, 43.

ceptions about it and were capable of giving the accused a fair and impartial trial.'

4. In the course of the *voir dire* examination, one of the prospective jurors stated in the presence of the other veniremen, in response to a question by the Assistant United States Attorney as to whether he felt he could give both sides a fair and impartial trial:

> I might mention we have did [*sic*] business with the pepole from Bell City and Vanduser[2] and they have caused them a lot of trouble by this mishandling by the fact that the farmers didn't get their money.

Counsel for the accused, out of the hearing of the panel, moved for a mistrial on the ground that the venireman's reference to the fact that "the farmers didn't get their money" was prejudicial (2 R. 153–154). The court denied the motion and, over the objection of counsel for petitioner, who contended that

---

[1] Illustrative of the comments by the veniremen in this latter category were the following: "I do remember seeing or reading an article or hearing something about it but I wasn't interested and didn't pay any attention to it" (2 R. 119); "I glanced through the article when it came out but I had no interest and I just forgot about it" (2 R. 133); "Possibly a couple or three times I seen it in the paper but I wasn't interested enough to read the articles" (2 R. 113); "I just read the headlines as anybody reads headlines, I didn't go into detail on it" (2 R. 112); "Just the headlines. * * * I wasn't concerned" (2 R. 97); "* * * I possibly glanced through it" (2 R. 108); "* * * I didn't bother with it" (2 R. 166); "* * * I have forgotten all about it" (2 R. 98, 122, 124); "* * * it went in one ear and out the other" (2 R. 107).

[2] These were two of the towns in which Federal maintained elevators from which some of the grain involved in the indictment had allegedly been stolen (1 R. 1).

an instruction would "emphasize this matter rather than cure it" (2 R. 154), instructed the panel to "disregard the remarks of the last juror who is being examined and cast from your mind anything he may have said or that anybody else may say that is not evidence in this case to cause an impression relative to the guilt or innocence of either one of these defendants" (2 R. 155).*

5. On the afternoon of the second day of the *voir dire* examination, the court reported to the panel that it had come to the court's attention that one of the panel members who had been excused for cause, a Mrs. Lakeman, had, during a recess, made a remark in the ladies' restroom concerning one of the defendants on trial, and inquired whether any of the ladies still on the panel had heard it or knew anything about it (2 R. 191–192). When several panel members responded affirmatively, the court held a hearing in chambers to ascertain the facts (2 R. 192–205). Five lady members of the panel were called in and informally questioned by the court and counsel for both sides. They stated in substance that while in the restroom they had heard Mrs. Lakeman remark to petitioner's wife (whose identity was not known to Mrs. Lakeman) that she (Mrs. Lakeman) was surprised to see petitioner in the courtroom because she thought he was still in the penitentiary (2 R. 193–195, 196, 198, 201, 204). Each of the interrogated panel

* The panel member whose remark had occasioned the instruction was excused for cause upon his acknowledgment that he entertained some prejudice about the case (2 R. 155).

members stated, on inquiry, that the remark did not prejudice her against petitioner (2 R. 193–194, 197, 199, 202, 204).

At the conclusion of the hearing, the court asked counsel for petitioner if there was any motion he wished to make. Counsel replied in the negative (2 R. 205). While indicating that he had some concern as to what "the rest of the panel" might have heard about the incident under inquiry, and how anything they might have heard might affect their feelings toward petitioner (2 R. 206), counsel expressly stated, on inquiry, that he had no objection to any of the interrogated venirewomen remaining on the panel (2 R. 207–208).

Pursuant to a procedure which the court indicated would be followed as a result of the incident under inquiry (2 R. 207), petitioner himself was then called into the court's chambers, where, over objection by the government, he was permitted to testify, under interrogation by his counsel and in the absence of any panel member, concerning a prior State and related federal conviction (2 R. 208–212). He was permitted to explain in some detail the factual background of these prior convictions (2 R. 209–210). Government counsel's objection to these recitals was based on the asserted fact that they were "irrelevant" and "self-serving", and had "no place" in connection with the *voir dire* examination of prospective jurors (2 R. 212).

The court then announced that it would permit counsel for petitioner, in view of the restroom incident

and the subsequent developments, to "make a statement" to the panel members concerning "the circumstances of those two offenses of which Mr. Butler was convicted" and to inquire of them "whether or not those facts would prejudice them" against either accused (2 R. 212). Accordingly, counsel for petitioner, again over government objection, was permitted to tell the members of the jury panel, in counsel's language, about his client's prior convictions and the circumstances which led up to them, and to inquire of each panel member whether the convictions would prejudice the prospective juror against his client in the juror's consideration of the evidence which would be adduced in this case (2 R. 220–229).[10]

[10] Counsel's statement concerning the background of the convictions was, in part, as follows (2 R. 221–222):

> In 1954, approximately, [petitioner] was engaged in the marketing business which he has been in all of his life, buying and selling commodities on the futures market. He had what they call cornered the soybean market. He owned probably close to 96 percent of all the futures on all the soybeans. He was heavily invested in other commodities such as cottonseed oil and cotton and so on. He at that time was worth several million dollars. * * * Mr. Butler owned an export elevator on the gulf at Mobile, Alabama. During that period he sold warehouse receipts in a great quantity representing two or three million bushels of beans to one or two concerns in Chicago and New York. These warehouse receipts were paper, they were sent in the mail to these houses representing that they had sold these million bushels of beans or so and that they were in the warehouse there at Mobile. As a matter of fact, at the time these warehouse receipts were sent through the mail or sold, there were only a part of those beans in the warehouse. He had other beans bought on contract in Chicago and around the country and beans

Each panel member, in response to a specific inquiry by petitioner's counsel, stated that the matters related by counsel would not influence him in appraising the evidence introduced in the instant case or prevent him from giving petitioner a fair and impartial trial (2 R. 224–229). Counsel did not move to strike for cause any member of the panel on account of the restroom incident and the subsequent developments.

6. At the trial, after petitioner had testified on direct examination, he was asked on cross-examination whether he had ever been convicted of a felony. He replied that he had. He was then asked what that felony was. Over petitioner's objection, the court required petitioner to answer. The trial judge observed that while ordinarily the government would be permitted to establish only the fact that the witness had been convicted of a felony, in this case petitioner had, at counsel's request and prior to the empaneling of the jury, been permitted to make a statement under oath about the nature of his prior convictions, and

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also on barges on the river which were going in that direction in sufficient quantity to cover the sale that he had made but they were not in the warehouse. That was a violation of the law to sell these warehouse receipts when those beans were not in the warehouse. It was a violation to send those receipts under those circumstances through the mail.

* * * * *

* * * [Petitioner] was then charged with violating the law which he did violate which is not only an offense in respect to the State of Tennessee but is an offense as far as sending these certificates through the mail. * * * He went into court, admitted that that was what he done [sic]. He received a sentence and a fine. * * *

counsel had then been permitted to make a statement to the prospective jurors about the circumstances of those convictions and to question them with respect thereto (7 R. 1570–1571). Government counsel was then permitted to bring out through questioning that petitioner's State court conviction had been for obtaining money under false pretenses by issuing warehouse receipts for over a thousand boxcars of grain when, in fact, there were only four boxcars of grain in the warehouse (7 R. 1572–1573).

ARGUMENT

1. There is no merit to petitioner's contention that he was entitled, as of right, to a change of venue from the Southeastern to the Eastern Division of the district (Pet. 6–10). Rule 21(a) of the Federal Rules of Criminal Procedure (*supra*, p. 2) vests large discretion in the trial court as to whether a change of venue is required in the interest of justice in the circumstances of a particular case. See, *e.g.*, *Connelly* v. *United States*, 249 F. 2d 576, 584–585 (C.A. 8), certiorari denied, 356 U.S. 921; *United States* v. *Moran*, 236 F. 2d 361, 362 (C.A. 2), certiorari denied, 352 U.S. 909; *Reynolds* v. *United States*, 225 F. 2d 123, 128–129 (C.A. 5), certiorari denied, 350 U.S. 914. Cf. *Stroud* v. *United States*, 251 U.S. 15, 18–20. There was no abuse in this case. The mere existence of publicity, even if intensive, does not require a change of venue. *Estes* v. *United States*, 335 F. 2d 609, 614 (C.A. 5), certiorari denied, 379 U.S. 964; *United States* v. *Moran*, *supra*, 236 F. 2d at 362;

Reynolds v. *United States, supra,* 225 F. 2d at 128–129. Cf. *Stroud* v. *United States, supra,* 251 U.S. at 18–20. "The ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the *voir dire* examination." *Blumenfield* v. *United States,* 284 F. 2d 46, 51 (C.A. 8), certiorari denied, 365 U.S. 812. A trial court may, accordingly, properly defer the disposition of such a motion until after the *voir dire* examination of the prospective jurors, and may deny it at that time if it ascertains from those proceedings that a fair trial in the district or division can be had. *E.g., Estes* v. *United States, supra,* 335 F. 2d at 614. This, in substance, was what the trial court did here.[11]

The *voir dire* examination held in this case did not, contrary to petitioner's contentions, disclose any sound reason for the court to grant the requested transfer at that time. Twenty-two of the approximately 60 veniremen who were summoned were excused for cause for reasons associated with prejudice,

[11] *United States* v. *Florio,* 13 F.R.D. 296 (S.D.N.Y.), relied on by petitioner (Pet. 9), gives no support to his position. In that case a change of venue was granted because of, among other things, an "avalanche of publicity", adverse to the accused, which had "reached the public on the very morning when the jury was to be impaneled" (13 F.R.D. at 297–298). Nothing like that occurred in the instant case. Because of the "unique" situation presented in the cited case (*id.* at 298), the trial court there exercised its discretion in favor of a venue change. The court, significantly, noted in its opinion that it was "emphatically not [its] view that in all cases where there is considerable publicity should the court grant a change of venue" (*id.* at 299).

under the most liberal of standards after extensive, personally conducted oral inquiry by defense counsel. But the court had no difficulty in assembling a roster of persons, free of bias, large enough to permit the empaneling of the jury of twelve and two alternates after allowing for all peremptory challenges authorized by law. It is true that many of those not excused for cause had heard something about the case as a result of its earlier publicity.[12] All the jurors, however, were able to assure the court and counsel that they were free of preconceptions in the matter and could give the accused a fair and impartial trial. That the jury in fact entertained no bias or prejudice against petitioner is strongly suggested, moreover, by the fact, noticed by the court of appeals (Pet. App. 10a), that it acquitted petitioner on two of the four counts which were submitted to it (see note 1, *supra*).

The vague remark during the *voir dire* by one of the veniremen (*supra*, pp. 8-9) did not require either the declaration of a mistrial, as the accused requested, or the granting at that time of the motion for transfer. The court promptly instructed the other members of the panel to disregard the remark and not to permit it to influence them in any way in any verdict they might be called on to return if selected as jurors. The venireman who made the remark in question was excused. This was an adequate safeguard, particularly since, as the court of appeals observed, the "es-

[12] For the details as to the extent to which the jurors who actually sat on the case had heard about the case previously, see the court of appeals' opinion at Pet. App. 9a.

sential contents of the venireman's statement were later presented in testimony before the jury" (Pet. App. 8a).

Petitioner's reliance on 28 U.S.C. 1865(a), providing that "[g]rand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service * * *" (Pet. 8–9, 10), is misplaced. He argues that the first portion of this provision "[s]eemingly * * * would have dictated instant acquiescence in at least the motion to restrict the jury panel to residents of counties where people had not dealt with [Federal]" (Pet. 8–9; see p. 6, *supra*. While the language relied on would undoubtedly have *authorized* the court, in its discretion, to restrict the membership of the panel in the manner suggested (see *Connelly* v. *United States*, 249 F. 2d 576, 583–584 (C.A. 8), certiorari denied, 356 U.S. 921; *Myers* v. *United States*, 15 F. 2d 977, 978–979 (C.A. 8)), we are aware of no decision, and petitioner cites none, which construes this provision as *requiring* the court to exclude from the venire residents of certain areas of the district merely because those residents may be more likely to be familiar with the events to be tried than the residents of other areas. If the court, in other words, is convinced that a fair and impartial jury can be empaneled without the imposition of such a geographical restriction on the makeup of the panel (which belief will of course be subject to the test of the

voir dire examination), it is not required to impose such a restriction in advance merely because it might agree that the selection of the jury would be simpler or speedier if such a limitation were imposed. The provision, in short, has never been deemed to deprive the court of the discretion with which it has always been deemed clothed in the handling of motions of this character. Cf. *Walsh & Wells* v. *City of Memphis*, 32 F. Supp. 448, 450–451 (W. D. Tenn.) (a civil case, under a substantially similar predecessor statute, involving a motion to exclude from the jury panel all residents of a particular county of the division). Furthermore, petitioner did not, in his pre-trial motion, rely on, or even call the court's attention to, the provision now invoked, which, so far as appears, he urged for the first time on appeal. He can hardly be permitted to fault the trial court for failing to grant a motion on the basis of a provision of law which he did not even call to the court's attention.

2. There is likewise no substance to petitioner's claim that his conviction should be summarily reversed because the jury was exposed, as a result of adverse publicity, to information about a prior crime of which he had been convicted (Pet. 2, 10–13). When it became apparent, at the *in camera* hearing held during the *voir dire* examination (pp. 9–10, *supra*), that five lady members of the panel had become aware that petitioner had served a term in the penitentiary, petitioner's counsel, though invited to do so by the court, refrained from making any motion and stated that he was agreeable to all five of the ladies' remaining on

the panel. In accordance with a procedure which, so far as appears, was agreeable to petitioner's counsel, counsel was permitted to make a statement to the jury panel, describing in his own language the nature of the prior offenses and the background circumstances. Counsel thereafter elected not to request the excusal of any member of the panel for cause.

We submit that the handling by the trial court of the unique situation presented by the restroom incident and the subsequent developments involved an appropriate exercise of the court's discretionary authority. Petitioner's principal contention—apart from the claim that the remark itself demonstrated hostility in the division—is that it was error for the court to permit petitioner to be cross-examined with regard to the prior convictions. That ruling was, however, well within the limits of the court's discretion. As noted by the court of appeals, "the trial judge recognized * * * that [petitioner] opened up the scope of the inquiry himself" (Pet. App. 10a). Except for the numbers of boxcars involved in the prior offense, the jurors were already aware, from defense counsel's own statement to them during the empanelment proceedings (note 10, *supra*), of the essential facts underlying the prior convictions. They knew from that statement that the offense had involved "warehouse receipts" issued by petitioner for "beans [which] were not in the warehouse" (note 10, *supra*). Defense counsel had, to be sure, sought in his statement to present the underlying facts in as soft a light, from his client's viewpoint, as he could.

But since the basic facts were already known to the jury, as a consequence of counsel's strategic decision to make them known himself even before the jury was selected, the additional details brought out by the prosecutor were in no event a basis for reversible error.[13]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1966.

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[13] *Marshall* v. *United States*, 360 U.S. 310, involved a factual situation far afield from anything that occurred in this case, and petitioner's reliance on it (Pet. 12–13) is for that reason misplaced. There, the jury learned through some news accounts, in the course of a trial, that the defendant had previously been convicted for practicing medicine without a license—information which the trial judge had specifically excluded because he deemed it too prejudicial to warrant its admission on a theory of relevance which had been proposed by the government. Because of the jurors' exposure, in this manner, to information which had been ruled "so prejudicial it could not be directly offered as evidence" (360 U.S. at 312), this Court reversed the resulting conviction in the exercise of its supervisory powers. In the present case, the fact of the prior convictions was concededly admissible, and the additional elaboration was permissible in light of what petitioner's own counsel had previously reported to the jury.

U.S. GOVERNMENT PRINTING OFFICE: 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 871

LANDON V. BUTLER, *Petitioner*

v.

UNITED STATES OF AMERICA

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Petitioner has contended that, by refusing to grant his various protective motions, the trial court failed to assure the jury "most favorable to an impartial trial", and thus violated the Federal standard for jury selection, as enunciated in 28 U.S.C. § 1865(a). The wording of this statute directed acquiescence in at least the motion to restrict the venire to the counties unaffected by the events of the case. The government has made two answers to this argument. First, that § 1865(a) is not mandatory, and second, "that petitioner did not in his pre-trial motion rely on, or even

call the court's attention to, the provision now invoked which so far as it appears, he urged for the first time on appeal." (Brief in Opposition, pp. 16-17.)

The short answer to the government's first contention is that the word "shall", which appears in 28 U.S.C. § 1865(a), is usually construed as mandatory. See *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, 220-21 (1946), in which this Court said, in speaking of the statutes regulating Federal jury selection: "The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This discretion, of course, *must be guided* by pertinent statutory provisions." The Court then pointed out that Federal jurors "*must* be returned from such parts of the district as the court may direct so as to be most favorable to an impartial trial", (emphasis supplied) and quoted 28 U.S.C. § 1865(a).

Whether the statute is mandatory or a powerfully phrased guide to discretion does not, however, matter to petitioner's argument. Certainly, the statute's "shall" language is a significant Congressional directive on the issue of Federal jury selection. It strongly suggests that the Federal standard is not to be a minimal one of checking the actual performance of a jury, but that every step must be taken at the outset to assure the fairest possible jury.

The government's second argument does not deny that the extensive protective motions and the oral arguments presented fully the factors which would detract from the impartiality of a trial in Cape Girardeau, especially if the jury was selected from the farming counties affected by the case. Since the factual

issues were completely presented to the trial court, the omission of a particular statutory citation is without legal significance. It might even be presumed that a district court which deals in almost every case with the standards for jury selection would be presumed to know the applicable statutes. In *Yorkshire Insurance Company* v. *United States,* 171 F. 2d 374 (3d Cir. 1948), *affirmed* 338 U.S. 366 (1949), the fact that a procedural rule relied upon by a defendant to sustain the judgment in his favor was asserted for the first time upon the appeal did not prevent its consideration by the Court of Appeals. See also *Maxwell* v. *United States,* 334 F. 2d 181 (5th Cir. 1964) in which appellant relied very heavily upon a point which had been little litigated in the trial court. The Court of Appeals said:

> "It is true that appellant may not raise issues on appeal which were not raised below . . . but the rule is different where the question is fairly put in issue by the pleadings and proofs and is not abandoned. Cf. Chase Manhattan Bank v. Commissioner (5th Cir. 1958), 259 F.2d 231. There may have been a soft-pedalling of the issue in the court below but it fell short of abandonment."

The situation here is analogous to the cases in which the trial court has applied the wrong state law in conflict situations. When this occurs, an Appeals Court on its own motion, or when the issue is raised for the first time to it, will remand the case for a new trial and the application of the correct rule of law. See *United States* v. *Malphurs,* 316 U.S. 1 (1942). See also *United States* v. *Certain Parcels of Land, etc.,* 144 F. 2d 626, 630 (3d Cir. 1944). The instant situation is, of course, far less extreme since the factual

basis and the arguments in the trial court were moulded to the correct rule of law.

Finally, since the government failed to object in its ample Court of Appeals Brief to appellant's citation of the law, it has, on familiar principle, waived that objection here. Compare *Fleishhacker* v. *Blum,* 109 F. 2d 543 (9th Cir. 1940), in which the Court of Appeals rightly said that though the pleadings below had not specifically framed the issue then before it "since the parties have assumed that the question is properly before us, we will consider and decide it." 109 F. 2d 548.

Petitioner's other contentions and the government's counter-contentions are fully covered in the Petition and Brief in Opposition.

Respectfully submitted,

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February 9, 1966